92-291

No. 92-

Supreme Court, U.S.
FILED
AUG 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

October Term, 1992

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

ALEXANDER GRASSI, SR., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August 10, 1992

QUESTION PRESENTED FOR REVIEW

May a court decide whether a proceeding is an independent and removable "civil action" under 28 U.S.C. § 1441 by referring to state, rather than federal, law?

PARTIES TO THE PROCEEDING

Petitioner International Paper Company ("IPC")[1] was the appellant below. Ciba Geigy PLC ("PLC"), named as a defendant in the underlying action, has never appeared in this litigation.

Respondents, all of whom are appellees below, are Alexander Grassi, Sr. and Karen S. Grassi (individually and as next friends of Alexander Grassi, Jr.), Wendi Lu Grassi and Kristen Suzanne Grassi (minors) and IRI Internacional Limitada.

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[1] IPC has no parent company. The following is a list of IPC subsidiaries that are not wholly owned: Rondau Investments Ltd.; Carter Holt Harvey Ltd.; Scitex Corporation Ltd.; Joost & Preuss Versieherungsmakler GnbH; Kanzan Spezial Papiere GnbH; Forest Insurance Ltd.; Z-P Formular GnbH; Etablissments Celerier S.A.; Exploration Forestiere Celerier S.a.r.L.; Promafor S.A.; Rhone Valley Packaging S.A.; Societe Francaise D-A Chats de Rondins S.A.; Union Pour Le Developpement de la Recuperation de Papiers S.A.; Rengo International Products Co. Ltd.; Paper Industries Corporation of the Philippines; Torras Domenech S.A.; and Corporacion Forestal de Venezuela, C.A.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTERNATIONAL PAPER COMPANY respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 1, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit herein is reported at 961 F.2d 558 (5th Cir. 1992). This decision vacated the remand order of the United States District Court for the Southern District of Texas, Civil Action No. B-90-174 (D.Tex. Dec. 13, 1991). The opinion of the Court of Appeals is reprinted in Appendix A; the Memorandum and Order of the District Court is reprinted in Appendix B.

STATEMENT OF JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 1, 1992, and a timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 30, 1992. (App. C) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation of 28 U.S.C. § 1441 which is entitled "Actions Removable Generally". Because of its length, the text of the statute is set forth in Appendix D.

STATEMENT OF THE CASE

A. Summary of Facts

This case arises from a 1983 products liability action involving insulating material which was allegedly manufactured, in part, by PLC, a subsidiary of Ciba Geigy, Ltd. ("Limited"), and installed by another party in plaintiffs' house. PLC did not appear in this action, and in 1986 plaintiffs below (respondents here) obtained a default judgment against PLC for the sum of $21,382,843. (App. 2a) Since then, respondents have initiated three separate actions to collect the judgment from three persons not party to the original judgment and in each case have attempted to prevent the exercise of the defendant's right of removal.

First, in 1988, respondents filed an action against Limited seeking to enforce the default judgment against PLC, which Limited removed to federal court. *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 182 (5th Cir. 1990). The district court denied respondents' remand motion, concluding that respondents had assigned a two percent interest in their default judgment to a Costa Rican corporation, IRI Internacional Limitada, for the purpose of destroying federal subject matter jurisdiction. The Fifth Circuit of Appeals affirmed that decision on February 16, 1990. *Id.* at 186.

Second, on October 26, 1988, respondents filed an application for turnover relief, relying on the Texas turnover statute, Tex. Civ. Prac. & Rem. § 31.002 (Vernon 1986 and 1991 Supp.), to reach the shares of Ilford Photo Corporation ("Ilford Photo").[2] Employing a different stratagem to defeat federal jurisdiction, respondents brought this post-judgment action under the 1983 state court docket number. Ilford Photo removed the action, but in an order of March 14, 1989, the district court remanded it on the ground that § 1446(b) barred removal of cases commenced more than a year prior to removal. On August 29, 1990, respondents voluntarily dismissed the action against Ilford Photo.

Third, respondents brought this fraudulent conveyance action against IPC, a total stranger to the underlying products liability action, but styled this action a "First Amended Application for Turnover Relief" in order to file it under the caption of the earlier products liability action against PLC which was concluded by the entry of a default judgment in 1986. Respondents have sought to divest the federal courts of removal jurisdiction of a new claim—here for a fraudulent conveyance—against a new party, IPC, which unlike Ilford Photo, has never had any corporate affiliation with PLC, by the contrivance of captioning this civil action with the docket number of a closed action.

B. Proceedings Below

On August 29, 1990, respondents filed a fraudulent conveyance action seeking relief against IPC, which they styled First Amended Application for Turnover Relief ("Turnover Application"), in order to file it under the caption of a closed 1983 products liability lawsuit in which plaintiffs obtained a default judgment against Ciba Geigy PLC ("PLC") in 1986. Petitioner IPC timely removed this action on September 21,

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[2] Ilford Photo was a Delaware corporation headquartered in Paramus, New Jersey, engaged in the photographic business which was a subsidiary of PLC, but had no relation to the events concerning plaintiffs' 1983 products liability action. Ilford Photo was part of the Ilford group of companies which was sold to IPC on April 6, 1989.

1990, to the United States District Court for the Southern District of Texas, Brownsville Division, on the basis of diversity jurisdiction, 28 U.S.C. § 1332(a)(1),[3] pursuant to 28 U.S.C. § 1441(a) and (b). Respondents filed a motion to remand, claiming that the removed action constituted a "continuation" of the products liability action in which a final judgment was entered in 1986, and that, therefore, removal was barred by the one-year limitation upon removal under 28 U.S.C. § 1446(b).[4]

On December 13, 1991, the district court remanded this action after finding that the disposition of the remand motion was inextricably intertwined with the merits of respondents' fraudulent conveyance action. (App. B) As the Fifth Circuit concluded, "the Court remanded the case because '[i]n the spirit of federalism it would be wiser to leave this essential finding in the hands of the state court.'" (App. 6a, *quoting* Memorandum and Order, App. 3b)

Petitioner IPC petitioned the Fifth Circuit Court of Appeals for a writ of mandamus and appealed the remand. On June 1, 1992, the Fifth Circuit unanimously granted the mandamus petition, vacated the district court's remand order and dismissed the appeal. It remanded the action to the district court to decide "whether, under Texas law, a plaintiff may seek turnover relief

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[3] That section provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;"

28 U.S.C. § 1332 (a)(1).

[4] Section 1446(b) provides in part:

"If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action."

from a new defendant by alleging that the new defendant obtained the property in violation of the UFTA [the Uniform Fraudulent Transfer Act] and thus the original defendant (the judgment debtor) retains ownership or control of the property". (App. 8a) The Court concluded that "[t]he key jurisdictional question is . . . whether the Grassis can seek to prove that there was fraud in the transfer as part of their attempt to obtain relief under the turnover statute." *Id.*

Because the Fifth Circuit panel's decision regarding the application of state law to a § 1441 removal decision directly contravened earlier rulings of the Fifth Circuit and this Court, IPC petitioned the Fifth Circuit for a Rehearing and Suggestion for Rehearing En Banc. On June 30, 1992, the Fifth Circuit denied the petition.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's holding that the determination of whether a turnover application is a separate "civil action" under § 1441 depends on state, rather than federal law, directly contradicts established precedents of this Court and every Court of Appeals that has considered the issue in modern times. As such, the Fifth Circuit's ruling sets a dangerous and conflict laden precedent. Left uncorrected, the Fifth Circuit's decision would allow § 1441 removal decisions to be decided on the basis of state law, thereby eliminating the possibility of a uniform federal standard that can be applied by district courts. The error in the Fifth Circuit's analysis has ramifications ranging far beyond the confines of this case and needs to be corrected.

It is critical that the Court rule on this issue at this point in time. Since a district court's remand order is generally not reviewable by appeal or otherwise, denial of this petition may result in this case wending its way through lengthy proceedings in a state court which has erroneously been granted jurisdiction. 1A Moore's Federal Practice ¶¶ .157 [1.-3] (2d ed. 1992).

I. By Holding That the Disposition of a Remand Motion Is Dependent upon State, Rather Than Federal Law, the Fifth Circuit Court of Appeals' Decision Directly Conflicts with the Precedents of This Court.

The narrow issue before the district court was whether the turnover application was a separate "civil action" under § 1441, removable to federal court. As set forth below, the answer to this question depends upon federal, not state, law. But without any discussion of the controlling authorities, the Fifth Circuit remanded to the district court to determine this issue *under Texas law* and instructed the court to decide whether the fraudulent conveyance claim was properly brought as a Turnover Application under state law. (App. 8a) To IPC's knowledge, this is the only decision by a United States Court of Appeals in modern times to hold that the question of whether a state proceeding is an independent "civil action", removable under 28 U.S.C. § 1441, is to be determined by reference to state law.

This Court has repeatedly held that the removal statutes are to be interpreted under federal and not state law. In *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), this Court held that Texas procedural rules cannot affect removal jurisdiction:

> "While, of course, Texas is free to establish such rules of practice for her own courts as she chooses, the removal statutes and decisions of this Court are intended to have uniform nationwide application."

Id. at 705. Likewise, in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), this Court rejected the claim that the definition of "defendant" under § 1441 depended upon Texas practice:

> "[T]hat decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by the state statutes or decisions. . . . The removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be

> construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts."

Id. at 104. *See also Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954) (a state's "procedural provisions cannot control the privilege of removal granted by the Federal statute"); *Road District v. St. Louis S. W. Ry. Co.*, 257 U.S. 547, 551 (1922) (holding under predecessor to § 1441 that whether an action is "a suit at common law" does not depend upon state court characterization of the proceeding); 1A Moore's Federal Practice ¶¶ .157 [1.-3], .157 [4.-2], .157 [4.-10] (2d ed. 1992) (federal law controls the construction of § 1441). Because the Fifth Circuit's decision directly contradicts the rulings of this Court, this petition for a Writ of Certiorari should be granted.

II. The Fifth Circuit's Decision Below Directly Conflicts with Holdings of the Second, Fourth, Eighth and Ninth Circuits.

The Fifth Circuit's decision below is, to IPC's knowledge, the only decision by a United States Court of Appeals in modern times to hold that the question of whether a proceeding is an independent and removable "civil action" for § 1441 purposes is to be interpreted under state, rather that federal, law. On the other hand, the Second, Fourth, Eighth and Ninth Circuits have expressly held that federal law controls the interpretation of federal removal statutes.

In *Yonkers Racing Corporation v. City of Yonkers*, 858 F.2d 855, 862 (2d Cir. 1988), the Second Circuit cited *Shamrock*, 313 U.S. at 104, for the proposition that state procedural law cannot supersede the privilege of removal granted by a federal statute.

In *Able v. Upjohn Company, Inc.*, 829 F.2d 1330, 1333 n.2 (4th Cir. 1987), the Fourth Circuit held that "[c]onstruction of the removal statutes is purely a matter of federal law" and that "[c]ourts must look to federal criteria, 'irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts'". *Id.*, *quoting Grubbs*, 405 U.S. at 705.

In *Randolph v. Employers Mutual Liability Ins. Co. of Wis.*, 260 F.2d 461 (8th Cir. 1958), the Eighth Circuit affirmed that "the question whether a civil action is removable and has been properly removed is one for the consideration of the federal court and is not controlled by state law". *Id.* at 463, *quoting Stoll v. Hawkeye Casualty Co.*, 185 F.2d 96, 99 (8th Cir. 1950). The conflict between the Fifth Circuit's decision below and the Eighth Circuit's holding in *Randolph* could not be more sharply defined as evidenced by the *Randolph* Court's holding on the removal of a garnishment proceeding:

> "Since federal law controls on the question of whether the garnishment proceeding is a civil action, the classification which the Missouri Courts give garnishment proceedings is in no way binding upon us."

Randolph, 260 F.2d at 464.

Finally, in *McCarthy Western Constructors, Inc. v. Phoenix Resort Corp.*, 951 F.2d 1137, 1140 (9th Cir. 1991), the Ninth Circuit held that:

> "The removal jurisdiction of the Federal Courts is derived entirely from the statutory organization of Congress. We look to federal law to determine whether the elements of removal jurisdiction have been established under the statutes . . ."

Id.

Petitioner IPC submits that the direct and distinct conflict between the Fifth Circuit's decision below and the holdings of the Second, Fourth, Eighth and Ninth Circuits warrants the granting of this petition for a Writ of Certiorari.

III. The Fifth Circuit's Decision Below Also Directly Conflicts with Established Fifth Circuit Precedent.

Until the Fifth Circuit panel's decision, the Fifth Circuit has followed the Supreme Court precedents and construed the removal statutes under federal law. In fact, confronted with the indistinguishable issue of whether a garnishment action is an independent "civil action" for purposes of removal under 28 U.S.C. § 1441, the Fifth Circuit held such actions to be

removable as a matter of federal law. *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979). In so holding, the Court explicitly stated that "the proper characterization [of a post-judgment enforcement proceeding] under § 1441 is essentially a matter of federal law . . . ." *Id.* at n.7.

In a series of other decisions, the Fifth Circuit has recognized the need for a uniform federal interpretation of the laws governing removal. *See Jones v. Roadway Exp., Inc.*, 931 F.2d 1086, 1092 (5th Cir. 1991); *Brown v. Demco, Inc.*, 792 F.2d 478, 480 (5th Cir. 1986); *Paxton v. Weaver*, 553 F.2d 936, 940 (5th Cir. 1977); *Central of Georgia Ry. Co. v. Riegel Textile Corp.*, 426 F.2d 935, 938 (5th Cir. 1970). In *Roadway*, the issue was whether Texas law controls the interpretation of 28 U.S.C. § 1445(c), which prevents the removal of a "civil action in any State court arising under the workmen's compensation laws of such State". 931 F.2d at 1091. The Fifth Circuit expressly held that state law cannot provide the basis for interpreting a federal removal statute. *Id.* In rejecting the application of state law, the Fifth Circuit reasoned that the Texas precedents "neither could nor did decide whether for the purposes of section 1445(c) an article 8307C claim arises under the compensation laws of Texas". *Id.*

The Fifth Circuit panel erred by holding that the scope of the Texas turnover statute determines IPC's right of removal. In determining that the issue upon remand to the district court is "whether, *under Texas law*, a plaintiff may seek turnover relief from a new defendant by alleging" a fraudulent conveyance (App. 8a (emphasis added)), the panel created an irreconcilable conflict with *Shamrock's* dictate that § 1441 "must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts". 313 U.S. at 104. While departing from the precedents of the Supreme Court and of the Fifth Circuit which recognize that the interpretation of the removal statutes is governed by federal law, the panel apparently did not recognize the conflict its decision would create. It failed to explain why the meaning of "civil action" in § 1441, in the circumstances of this particular case, should be determined by

state law, while the meaning of "defendant" should be determined by federal law. *See id.* at 107-108.

The rule of state law incorporation adopted by the Fifth Circuit panel is flawed both in its reasoning and in its result. A federal statute should be construed by its plain language and, to the extent the language is ambiguous, with reference to legislative intent. *See Toibb v. Radloff*, 501 U.S. __, __, 111 S.Ct. 2197, 2200 (1991). But Congress could not and did not intend that the right of removal should depend upon state law. *See Shamrock*, 313 U.S. at 104. Were state law to define "civil action", a defendant's right to a federal forum would differ depending upon state procedural rules, completely undermining the requirement of *Grubbs* and *Shamrock* that the removal statutes must be construed to have "uniform nationwide application". *Grubbs*, 405 U.S. at 705. Thus, under the panel's decision, a defendant could remove a garnishment action brought in Mississippi, *see Moore v. Sentry Ins. Co.*, 399 F. Supp. 929, 931 (S.D. Miss. 1975), but could not remove the same action if filed in Michigan, *see Action Auto Stores, Inc. v. United Capital Insurance Co.*, No. 5:91-CV-32, available on Westlaw as 1992 WL 21203 (W.D. Mich. 1992) (a copy of which is annexed hereto as Appendix E), because of disparate characterizations of the proceedings under varying state laws.[5] Conversely, to the extent state law treats post-judgment proceedings involving the same parties as new actions, state law could also expand the scope of a defendant's right of removal. The Fifth Circuit panel's rule thereby encourages forum shopping.[6]

A second problem with construing § 1441 by reference to state law is that the resolution of questions of state procedure

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[5] In *Action Auto* the United States District Court for the Western District of Michigan held that a garnishment proceeding against a stranger to the underlying litigation is subject to removal, even though under Michigan law such proceedings are ancillary to the original action. 1992 WL 21203 at *2. (App. 3e-4e)

[6] Respondents have a history of using every conceivable procedural device to improperly avoid the jurisdiction of the federal courts. *See* pp. 2-3, *supra*.

will necessarily reflect different considerations from those which should shape the interpretation of the removal statutes. While *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223 (Tex. 1991), and *Republic Insurance Company v. Millard*, 825 S.W.2d 780 (Tex. App. Houston [14th Dist.] 1992, no writ), for instance, squarely hold that a plaintiff may not enforce a judgment against a stranger to the original action by means of a turnover proceeding, they do so by interpreting the scope of the turnover statute, without any consideration of whether the third party's removal rights would be lost if the turnover statute were broadly construed. However, in our case, the reason the action is subject to removal under federal law is that the parties and liability issues in the post-judgment enforcement action are distinct from those involved in the underlying litigation, such that the new proceeding should be treated as a separate "civil action", regardless of its characterization under state law. *See Butler*, 592 F.2d at 1296.

CONCLUSION

For the reasons stated above, Petitioner International Paper Company requests this court to issue a Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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August 10, 1992

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APPENDIX A

APPENDIX A

961 F.2d 558

In re INTERNATIONAL PAPER COMPANY, Petitioner.

Alexander GRASSI, Sr., etc.,
Plaintiffs-Appellees,
v.
INTERNATIONAL PAPER COMPANY,
Defendant-Appellant.
Nos. 91-6363, 91-6364.
United States Court of Appeals,
Fifth Circuit.
June 1, 1992.

Plaintiffs who obtained default judgment in products liability action against alien corporation filed application for turnover relief in Texas court that entered original judgment, seeking order requiring turnover of interest in related domestic corporation for execution. After turnover application was removed to federal court and remanded, on ground that it was continuation of prior litigation, transferee purchased domestic corporation and other related businesses. Plaintiffs voluntarily dismissed their original turnover action and filed amended application for turnover relief, naming transferee as defendant and asserting fraudulent transfer claim. Transferee removed action to federal court. The United States District Court for the Southern District of Texas, Filemon B. Vela, J., granted plaintiffs' motion to remand, and transferee appealed and petitioned for writ of mandamus. The Court of Appeals, Reavley, Circuit Judge, held that: (1) remand order was reviewable, and (2) district court did not have authority to remand based on "the spirit of federalism."

Petition granted, remand order vacated, and case remanded to district court; appeal dismissed.

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Neil Norquest, Gordon L. Briscoe, Harlingen, Tex., Norton A. Colvin, Jr., Rodriguez, Colvin & Chaney, Brownsville, Tex., for plaintiffs-appellees.

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Russell H. McMains, Corpus Christi, Tex., real party in interest for I.R.I. Internacional Limitada.

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas.

Appeal from the United States District Court for the Southern District of Texas.

Before SNEED [FN*], REAVLEY and BARKSDALE, Circuit Judges.

FN* Circuit Judge of the Ninth Circuit, sitting by designation.

REAVLEY, Circuit Judge:

The district court remanded this case to state court "in the spirit of federalism." Because the district court lacked authority to remand on that ground, we grant International Paper Company's petition for a writ of mandamus and vacate the district court's remand order.

I. BACKGROUND

In 1983, Alexander and Karen Grassi, acting individually and as next friends of their three children, filed suit in Texas state court alleging that the insulation in their home released formaldehyde gases that caused them physical and emotional injuries. The Grassis ultimately joined Ciba Geigy PLC (CG-PLC), an English corporation which manufactured the insulation, as a defendant in the case. CG-PLC received notice in 1985 but failed to appear. On September 28, 1986, the state court entered a default judgment against CG-PLC for $21,382,843.

While investigating ways to enforce this judgment, the Grassis discovered that CG-PLC owned all of the shares of another English corporation, Ilford Limited, which in turn owned all of the shares of Ilford Photo Corporation, a Delaware corporation with headquarters in New Jersey. Ilford Photo was apparently the only asset that CG-PLC owned or controlled in the United States. On October 26, 1988, the Grassis filed an application for turnover relief in the Texas court that entered the original judgment, seeking an order requiring Ilford Limited, on behalf of CG-PLC, to turn over the Ilford Photo shares to the county sheriff for execution. Under the Texas "turnover statute," a court may order a judgment debtor to turn over nonexempt property that is "in the debtor's possession or is subject to the debtor's control." TEX.CIV.PRAC. & REM. § 31.002(b)(1) (Vernon 1986). As permitted by the turnover statute, the Grassis filed the application for turnover relief as a continuation of the suit that they originally filed in 1983. *See id.* § 31.002(d).

Ilford Photo removed the turnover proceeding to federal court on November 23, 1988, alleging federal diversity jurisdiction under 28 U.S.C. § 1332. The Grassis moved for remand to state court, arguing that, because the turnover proceeding was a continuation of the suit that they originally filed in 1983, 28 U.S.C. § 1446(b) prevents removal. Under section 1446(b), "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action." The district court agreed with the Grassis and remanded the case on March 14, 1989.

During the delay caused by the removal and remand, Ciba Geigy Limited (CG-Limited), which owns CG-PLC, pursued plans to sell its interest in Ilford Photo. Less than a month after the district court remanded the turnover application to state court, International Paper Company purchased Ilford Photo and other related businesses from CG-Limited for $241 million. As part of this deal, CG-Limited agreed to indemnify International Paper for any losses that might arise from the pending turnover proceeding.

On August 29, 1990, the Grassis voluntarily dismissed their original turnover action and filed an amended application for

turnover relief (the Amended Application) in the state court. The Grassis named International Paper as a defendant in the Amended Application, and alleged that International Paper purchased Ilford Photo in violation of the Uniform Fraudulent Transfer Act (UFTA), TEX.BUS. & COM.CODE §§ 24.001-.013 (Vernon 1987). The Grassis asked the state court to: (1) hold that, under section 24.008(a)(1) of the UFTA, the transfer of Ilford Photo was void to the extent necessary to satisfy the original judgment; and (2) order International Paper to turn over the Ilford Photo shares that it fraudulently acquired. Like the original application, the Grassis filed the Amended Application as a continuation of the suit that they originally filed in 1983.

International Paper removed the Grassis' Amended Application to federal court on September 21, 1990. In its notice of removal, International Paper asserted that the fraudulent transfer claim constitutes a new and independent civil action and thus is removable despite the one-year rule of section 1446(b). CG-PLC did not join International Paper's notice of removal. On October 10, 1990, the Grassis filed a motion to remand, in which they argued that: (1) because the fraudulent transfer claim is part of the Amended Application for turnover relief, it is not a new and independent action and thus section 1446(b)'s one-year rule prohibits removal; and (2) because the transfer was fraudulent, CG-PLC retained an equitable interest in Ilford Photo and thus CG-PLC's failure to join in International Paper's notice of removal required remand.

The district court granted the Grassis' motion to remand on December 13, 1991. Because the parties dispute the district court's reason for granting remand, we quote much of the district court's order:

> After extensively reviewing the pleadings, the motions and the numerous accompanying briefs, it seems one question is begging to be asked before a motion to remand can be granted. That question concerns whether or not fraud has occurred. If there is no fraud, then this case rightfully belongs in this court as a separate and independent action court under diversity jurisdiction. On the other hand, if fraud exists, the plaintiffs' claim to the contested property is a

direct extension of the state court suit for turnover relief and properly belongs in state court because of Ciba Geigy PLC's delay in filing for removal. Though on its face [International Paper] is a "new" party, that again is entangled in the issue of whether fraud exists.

In *American National Bank of Austin v. Mortgageamerica Corp.*, 714 F.2d 1266 (5th Cir. 1983), the Fifth Circuit dealing with the application of the Texas Fraudulent Transfers Act stated such an action was:

> essentially one for property which properly belongs to the debtor and which the debtor has fraudulently transferred in an effort to put out of reach of the creditors . . . . The transferee may have colorable title to the property, but the equitable interest—at least as far as the creditors (but not the debtor) are concerned—is considered to remain in the debtor so that creditors may attach or execute judgment upon it as though the debtor had never transferred it.

Id. at 1275. If this court were to delve into the existence of fraud in determining whether this case should be remanded, then the heart of the litigation would be settled. If it was found fraud existed, this court would have to remand to state court with the bulk of the matter predetermined before the state fact finder had an opportunity to make its own findings. In the spirit of federalism it would be wiser to leave this essential finding in the hands of the state court.

On December 30, 1991, International Paper filed a notice of appeal and, alternatively, a petition for writ of mandamus. We consider these together.

II. DISCUSSION

A. REVIEWABILITY

Whenever a party asks this court to vacate or reverse a district court's remand order, "the threshold question that confronts us is whether we have jurisdiction to consider [the] petition." *In re Allied-Signal, Inc.* 919 F.2d 277, 279 (5th Cir. 1990). "An order remanding a case to the State court from which

it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). The Supreme Court has construed section 1447(d) *in pari materia* with section 1447(c) and concluded that "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346, 96 S.Ct. 584, 590, 46 L.Ed.2d 542 (1976). In light of Congress' post-*Thermtron* amendment of section 1447(c), this court has concluded that "remand orders for lack of subject matter jurisdiction [are] the only clearly unreviewable remand orders." *In re Shell Oil Co.*, 932 F.2d 1518, 1520 (5th Cir. 1991), *cert. denied*, — U.S. —, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992). Although it is an open question, section 1447(d) may also prevent us from reviewing remand orders that are based on a timely-filed motion that alleges a "defect in removal procedure." *See id.* at 1520 n. 5; *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201 (5th Cir. 1991). We need not reach that question in this case.

The Grassis contend that section 1447(d) prevents us from reviewing this remand order because the district court based it on a lack of subject matter jurisdiction and on a timely motion alleging a defect in removal procedure. According to the Grassis' interpretation of the remand order, the district court accepted their arguments that section 1446(b)'s one-year rule and CG-PLC's failure to join the notice of removal required remand. We disagree. The district court believed that the one-year rule would require remand *if* the transfer of Ilford Photo to International Paper was fraudulent because, in that case, the existence of fraud would allow the turnover action to proceed against International Paper as an extension of the 1983 suit. But the court also believed that, if it determined that fraud was involved in the transfer, there would be little left to remand because the existence of fraud was the essential fact issue in the turnover proceeding. So the court remanded the case because "[i]n the spirit of federalism it would be wiser to leave this essential finding in the hands of the state court."

Because the district court remanded this case "in the spirit of federalism," and not because it lacked subject matter jurisdiction or because of a defect in removal procedure, section 1447(d) does not prevent us from reviewing the remand order.

B. REVIEW BY APPEAL OR MANDAMUS?

We now consider whether we review the district court's remand order by appeal or mandamus. *McDermott* recently addressed this question, and we need not repeat that discussion here. *See* 944 F.2d at 1201-04. When a district court has remanded a case without authority to do so, we review by mandamus. *Id.* at 1203 (citing *Thermtron*, 423 U.S. at 352-53, 96 S.Ct. at 594). Presumably, we will always vacate a remand order that we review by mandamus because the district court lacked authority to remand the case on the stated grounds. If, however, the district court had authority to remand on the stated grounds, we review by appeal to determine whether the court properly exercised its authority in that particular case. *Id.* at 1203-04.

As this court explained in *McDermott*, there are three potential sources of a district court's authority to remand a case: (1) statutes that grant such authority; (2) a contract between the parties; and (3) circumstances that give the court discretion to dismiss the case. *Id.* at 1204. The district court in the present case, however, based its remand order on "the spirit of federalism," and not on one of these three sources. Because the district court remanded this case without authority to do so, we review by mandamus and vacate the district court's remand order.

C. DISPOSITION

We remand this case for the district court to consider the merits of the Grassis' motion to remand, and we offer the following guidance for the court's consideration. The Grassis argued that section 1446(b)'s one-year rule and CG-PLC's failure to join International Paper's notice of removal made removal improper. If the Grassis' Amended Application is a continuation of the action filed in 1983, then the Grassis are correct. The

district court believed that, to determine whether it could treat the Amended Application as a continuation of the suit filed in 1983, it needed to determine whether there was fraud in the transfer of Ilford Photo. But the question is actually whether, under Texas law, a plaintiff may seek turnover relief from a new defendant by alleging that the new defendant obtained the property in violation of the UFTA and thus the original defendant (the judgment debtor) retains ownership or control of the property. The key jurisdictional question is not, as the district court believed, whether there was in fact fraud in the transfer, but whether the Grassis can seek to prove that there was fraud in the transfer as part of their attempt to obtain relief under the turnover statute.

If the district court determines that the Grassis can allege that International Paper is a fraudulent transferee as part of their claim for turnover relief, then the Amended Application is an extension of the 1983 suit and the district court must remand this case to state court under the one-year rule of section 1446(b). If the Grassis cannot include the fraud claim in the turnover application, then the Amended Application asserts a fraudulent transfer claim against International Paper that is separate and independent from the 1983 suit.

We GRANT the petition for mandamus, VACATE the district court's remand order, and REMAND the case to the district court. International Paper's appeal is DISMISSED.

APPENDIX B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ALEXANDER GRASSI, SR. and KAREN S. GRASSI, INDIVIDUALLY and as next friends of ALEXANDER GRASSI, JR., WENDI LU GRASSI and KRISTEN SUZANNE GRASSI, minors, and I.R.I INTERNACIONAL LIMITADA v. INTERNATIONAL PAPER COMPANY and CIBA GEIGY PLC	CIVIL ACTION NO. B-90-174

Memorandum and Order

This case comes before this court after many other appearances in both the state and federal arena. The plaintiffs obtained a default judgment against Ciba-Geigy PLC ("PLC"), a British corporation, on September 26, 1986. On October 26, 1988, the plaintiffs attempted to collect their judgment by filing an application for turnover relief. In that action, the plaintiffs asked PLC to "turn over" for execution shares of Ilford Photo Corporation of New Jersey. Though Ilford had nothing to do with the actions which gave rise to the default judgment upon which the plaintiffs are now seeking to collect, Ilford was owned by a corporation which was and still is completely owned by PLC.

This action was removed by Ilford on November 23, 1988 because the motion to remove was filed more than one year after commencement of the suit. *See* this court's memorandum and order of March 14, 1989. While this action was pending before this court, Ciba-Geigy, Ltd, the owner of PLC issued a

letter of intent to sell the Ilford group to the International Paper Company ("IPC").[1] Shortly after this court remanded, the Ilford group was sold. IPC claims that this transaction was contemplated well before the plaintiffs began their turnover suit.

On August 29, 1990, plaintiffs filed their amended application for turnover relief in state court as an extension of the suit which was remanded by this court by the March 14, 1989 order. In this amended suit, plaintiffs asked the state court to hold that the judgment debtor's (PLC) transfer of the shares of Ilford to IPC was done for illegal and dilatory reasons and was therefore void as to plaintiffs to the extent necessary to satisfy plaintiffs [sic] judgment against PLC. Plaintiffs asked the state court to direct IPC to turnover, for execution, the shares of Ilford knowingly acquired pursuant to a fraudulent transaction. IPC removed to this court claiming it was an innocent third party and a turnover proceeding was an independent separate action which may be removed to federal court.

After extensively reviewing the pleadings, the motions and the numerous accompanying briefs, it seems one question is begging to be asked before a motion to remand can be granted. That question concerns whether or not fraud has occurred. If there is no fraud, then this case rightfully belongs in this court as a separate and independent action court under diversity jurisdiction. On the other hand, if fraud exists, the plaintiffs' claim to the contested property is a direct extension of the state court suit for turnover relief and properly belongs in state court because of Ciba Geigy PLC's delay in filing for removal. Though on its face IPC is a "new" party, that again is entangled in the issue of whether fraud exists.

In *American National Bank of Austin v. Mortgageamerica Corp.*, 714 F.2d 1266 (5th Cir. 1983), the Fifth Circuit dealing

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[1] There seems to have been several independent Ilford corporations existing in several different nation [sic]. The Ilford involved in this litigation was one of several.

with the application of the Texas Fraudulent Transfers Act stated such an action was:

> essentially one for property which properly belongs to the debtor and which the debtor has fraudulently transferred in an effort to put out of reach of the creditors . . . . The transferee may have colorable title to the property, but the equitable interest—at least as far as thee [sic] creditors (but not the debtor) are concerned—is considered to remain in the debtor so that creditors may attach or execute judgment upon it as though the debtor had never transferred it.

Id. at 1275. If this court were to delve into the existence of fraud in determining whether this case should be remanded, then the heart of the litigation would be settled. If it was found fraud existed, this court would have to remand to state court with the bulk of the matter predetermined before the state fact finder had an opportunity to make its own findings. In the spirit of federalism it would be wiser to leave this essential finding in the hands of the state court.

Accordingly we REMAND.

DONE in Brownsville, Texas, this 13th day of December 1991.

Filemon B. Vela
UNITED STATES DISTRICT JUDGE

APPENDIX C

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6363 and
91-6364

IN RE: INTERNATIONAL PAPER COMPANY,

Petitioner.

U.S. COURT OF APPEALS

FILED
JUNE 30, 1992

GILBERT F. GANUCHEAU
CLERK

ALEXANDER GRASSI, SR., ETC.,

Plaintiff-Appellee,

versus

INTERNATIONAL PAPER COMPANY,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 1, 1992, 5 Cir., 198_, _____F.2d_____)

(JUNE 30, 1992)

Before SNEED*, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

*Circuit Judge of the Ninth Circuit, sitting by designation.

APPENDIX D

APPENDIX D

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which state law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

APPENDIX E

APPENDIX E

1992 WL 21203

ACTION AUTO STORES, INC.,
a Michigan corporation, Plaintiff,
v.
UNITED CAPITOL INSURANCE COMPANY, Garnishee-defendant,
and
Oscar W. Larson Company,
a Michigan corporation, Defendant.
No. 5:91-CV-32.
United States District Court, W.D. Michigan, S.D.
Jan. 13, 1992.

L. David Lawson, Winegarden, Shedd, Haley, Lindholm & Robertson, Flint, Mich., for Action Auto Stores, Inc.

Constantine N. Kallas, Leonard A. Henk, Kallas, Lower, Henk & Treado, PC, Bloomfield Hills, Mich., for United Capitol Insurance Company.

OPINION DENYING PLAINTIFF'S MOTION TO REMAND

BENJAMIN F. GIBSON, Chief Judge.

*1 This case is before the Court on plaintiff Action Auto Stores' motion for remand based on lack of jurisdiction. Plaintiff maintains that garnishment actions are ancillary or supplemental proceedings and thus not removable under Title 28 United States Code Section 1441. Plaintiff also contends that even if this Court finds that garnishment actions are generally removable, this particular action should be remanded because there is not complete diversity between the parties.

I.

In 1988, Oscar W. Larson Company ("defendant") filed various actions in state court for money it claimed plaintiff owed it for work done at Action Auto locations. Plaintiff

counterclaimed alleging that defendant had negligently installed a gasoline containment system. Plaintiff also sued defendant in a separate action alleging that it failed to remove contaminated soil from several Action Auto locations.[1]

The parties entered a partial settlement prior to trial. According to the settlement, defendant dismissed its claims with prejudice. In return, plaintiff dismissed some of its claims and agreed not to execute on or enforce a judgment against any of defendant's assets except on those arising out of insurance policies or contracts. Defendant apparently stopped contesting some claims and a default was entered in the amount of $2,197,000.00. Plaintiff's other claims were tried in state court where a jury rendered a verdict of two million dollars against defendant.

Plaintiff filed a writ of garnishment in the Ingham County Circuit Court against United Capitol Insurance Company ("garnishee"). Garnishee filed a garnishee disclosure statement in which it alleged that it was not indebted to defendant and that, therefore, it should not be subject to garnishment. Garnishee argued that no underlying debt existed since the settlement agreement released defendant from liability and also argued that various provisions in the insurance policy prevented garnishment. On May 15, 1991, garnishee filed a petition for removal with this Court. Plaintiff subsequently filed its motion to remand.

II.

The United States Judicial Code states that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. s 1447(c). In reviewing plaintiff's motion, the Court must determine whether it has jurisdiction over the case. If it does not, the case must be immediately remanded. Doubts about whether jurisdiction exists should be construed against removal. *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979); *ANR Pipeline*

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[1] The actions were consolidated.

Company v. Conoco, Inc., 646 F.Supp. 439, 442 (W.D.Mich. 1986).

The federal removal statute provides, in part, that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States. . . ." 28 U.S.C. s 1441(a) (emphasis added). Thus, any proceeding that cannot properly be labeled a civil action is not removable. The statute further provides that "whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed. . . ." 28 U.S.C. s 1441(c). When a claim is merely ancillary to a nonremovable claim, the claims may not be removed to federal court under Section 1441(c). Supplementary proceedings and proceedings which are but continuations of prior suits are not removable. *Federal Savings and Loan Insurance Corporation*, 419 F.2d 1014 (7th Cir. 1969) (citing *Barrow v. Hunton*, 99 U.S. 80 (1879)).

III.

***2** It is clear that no grounds for federal jurisdiction are present in the underlying state action between Action Auto and Larson as the case involved neither federal questions nor diverse parties. If the present garnishment action is classified as merely ancillary to the state contract case, it is not removable. Neither party argues that ancillary actions are removable; the issue contested in this litigation is whether a garnishment action is properly labeled an ancillary action or whether it is a separate and independent civil action.

Michigan courts have held that garnishment actions should be classified as ancillary. *Stevens v. Northway*, 293 Mich. 31, 291 N.W. 211 (1940), *aff'd*, 312 U.S. 563 (1941); *Ward v. Detroit Auto. Inter-Insurance Exchange*, 115 Mich.App. 30, 320 N.W.2d 280 (1982). There is a split in authority, however, about whether a state court's characterization of its garnishment proceedings is dispositive in determining removability. *See Drs. Macht, Podore & Associates, Inc. v. Girton*, 392 F.Supp. 66, 67 (S.D.Ohio 1975)

and cases cited therein. The issue has not been addressed by the Sixth Circuit.

The Supreme Court has determined that a state's procedure cannot control the privilege of removal granted by federal statute. *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954). Allowing the state's labeling of its garnishment procedure to control this Court's determination about whether the action is removable might well be inconsistent with the *Chicago R.I. & P.R.* decision. *Drs. Macht, Podore & Associates*, 392 F.Supp. at 67; 1A James Moore, Moore's Federal Practice P 0.167 (2d ed. 1991); *see also Stewart v. EGNEP (Pty), Ltd.*, 581 F.Supp. 788, 789-90 (C.D.Ill.1983). The Court thus holds that it is not bound by state law but must make its own determination about whether the proceedings are ancillary.

Plaintiff argues that even if this Court decides that it may not merely adopt the label that the state court has attached to its garnishment proceedings, the state's interpretation of its garnishment law should nonetheless be entitled to great weight. See Plaintiff's brief at 4-5 (*citing Swanson v. Liberty National Insurance Company*, 353 F.2d 12, 13 (9th Cir.1965)). The Court agrees but finds that it is not merely the state's characterization of the action that is entitled to deference. The Court must also look to the procedural law that the state has enacted to implement garnishment and determine if, in fact, the procedure treats the action as separate and independent. *See Richmond v. Allstate Ins. Co.*, 624 F.Supp. 235 (E.D.Pa.1985) (stating that substance rather than form should determine ancillariness). The Michigan Court Rules state that if there is a dispute about a garnishee's liability, "the issue shall be tried in the same manner as other civil actions." M.C.R. s 3.101(M)(1). Michigan allows parties to file a jury demand (M.C.R. s 3.101(M)(4)) and to engage in discovery (M.C.R. ss 3.101(J)(3) and 3.101(M)(2)). Such rules indicate that, despite the label placed upon the action, the proceedings are treated in many ways as separate civil actions.

***3** Other courts which have found garnishment actions to be removable have based their holdings on the fact that the garnishments involve new parties with different interests than those present in the underlying actions. *Berry v. McLemore*, 795

F.2d 452, 455 (5th Cir.1986); *Butler v. Polk*, 592 F.2d at 1296; *Stewart v. EGNEP (Pty), Ltd.*, 581 F.Supp. at 790; *see also Graef v. Graef*, 633 F.Supp. 450, 453 (E.D.Pa.1986). The case before this Court certainly involves such factors. The underlying state action was to determine whether or not defendant polluted plaintiff's work sites by doing work negligently or by failing to remove contaminated soil. The garnishment action does not deal with this subject at all. Garnishee does not assert that defendant is not liable to plaintiff; instead, it contends that, for various reasons, it does not owe defendant any money and thus cannot be garnished for the benefit of the plaintiff.[2] The Court holds that the action is thus separate and independent from the state case.

IV.

Even though the Court has determined that this garnishment is an independent action, it is still not removable unless this Court has subject matter jurisdiction over the case. No party argues that the case involves a federal question; therefore, the Court only has jurisdiction if the requirements of diversity jurisdiction are met. Section 1332 of the United States Code which outlines the requirements of diversity jurisdiction has long been interpreted to require complete diversity between the parties. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Plaintiff argues that the case must be remanded because both it and defendant Oscar W. Larson Company are Michigan corporations. Garnishee contends that the parties are, in fact, diverse because defendant is merely a nominal party with no real interest in the case. Garnishee also claims that the parties should be realigned since defendant's

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[2] Plaintiff cites *Richmond v. Allstate Insurance Company*, 624 F.Supp. 235 (E.D.Pa.1985) and *Overman v. Overman*, 412 F.Supp. 411 (E.D.Tenn.1976) in support of its position that garnishment actions are not removable. These cases hold garnishment is ancillary because such actions depend upon the existence of a valid judgment. Thus, garnishment is merely a final step the plaintiff must take to get relief. *Overman*, 412 F.Supp. at 412. The Court is not persuaded by this reasoning. Although it is true that obtaining a valid judgment is a prerequisite to garnishment, this does not determine the nature of the action itself. Because the garnishee can raise issues wholly different than those litigated by plaintiff and defendant in the initial trial, the garnishment proceeding is an independent action.

interests coincide more with those of the plaintiff than those of the garnishee.

The Supreme Court has said that a federal court must "look beyond the pleadings and arrange the parties according to their sides in the dispute." *Dawson v. Columbia Ave. Sav. Fund S.D., T. & T.C.*, 197 U.S. 178, 180 (1905); *Indianapolis v. Chase National Bank*, 314 U.S. 63, 69 (1941). Garnishee cites cases holding that a defendant's interests are aligned with those of plaintiff's in garnishment proceedings. The Court need not determine whether this is generally the case, as the settlement agreement signed by defendant indicates that its interests are aligned with those of plaintiff in this particular action.

Through that agreement, the parties determined that any judgment against defendant would be collected from proceeds of insurance policies. By entering such an agreement, defendant prevented plaintiff from taking its other assets by directing it to its insurance proceeds. It has thereby demonstrated its interest in having the judgment satisfied through insurance proceeds instead of other assets.[3] As the Court has determined that the parties should be realigned, it need not reach the issue of whether defendant should be considered a nominal party.

V.

***4** For the reasons stated above, plaintiff's motion to remand is hereby denied. The Court will not award either party costs of the proceeding.

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[3] Garnishee asserts that in the settlement agreement defendant also promised to help plaintiff effectuate judgment against the insurers. The Court notes that such an agreement, if made, would be more evidence indicating the necessity of realignment.

Supreme Court, U.S.
FILED
SEP 10 1992
OFFICE OF THE CLERK

No. 92-291

In The

Supreme Court of the United States

October Term, 1992

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

ALEXANDER GRASSI, SR., ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Where a court adheres strictly to the settled federal definition of the term "civil action" under 28 U.S.C. § 1441, should it be prohibited from referring to state laws to determine whether the remedies provided therein constitute new and independent "civil actions" within the accepted federal definition?

PARTIES TO THE PROCEEDING

Ciba-Geigy PLC ("PLC") is the judgment debtor in the underlying action. Petitioner, International Paper Company ("IPC"), appellant below, is a named defendant in a turnover proceeding brought to enforce the judgment.

Respondents, appellees below, are Alexander Grassi, Sr. and Karen S. Grassi (individually and as next friends of Alexander Grassi, Jr., Wendy Lou Grassi, and Kristin Susan Grassi, minors), and IRI Internacional Limitada.

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STATUTES

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No. 92-291

In The

Supreme Court of the United States

October Term, 1992

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

ALEXANDER GRASSI, SR., ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

COME NOW ALEXANDER GRASSI, SR. and KAREN S. GRASSI, Individually and as Next Friends of ALEXANDER S. GRASSI, JR., WENDY LOU GRASSI, and KRISTIN SUSAN GRASSI, minors, and IRI INTERNACIONAL LIMITADA, and respectfully pray that Petitioner's request for issuance of a Writ of Certiorari herein be denied. Petitioner will be referred to throughout as "IPC"; Ciba-Geigy PLC, the judgment debtor, will be referred to as "PLC"; Respondents will be referred to as "Respondents"; Petitioner's Petition for a Writ of Certiorari will be referred to as "Petition, at p. ___" or

"Appendix ___"; and *emphasis in all quotations will be Respondents' throughout, unless otherwise indicated.*

REPLY TO THE STATEMENT OF THE CASE

A. Summary of Facts

An accurate Summary of Facts may be found in the "BACKGROUND" section of the Court of Appeals' Opinion (Appendix A), at pp. 2a through 5a. Petitioner's Summary of Facts contains the following inaccuracies, to-wit:

First, Petitioner incorrectly maintains that on three occasions the Respondents attempted to prevent "the *exercise* of the Defendant's *right* of removal", and thereby attempts to portray as non-meritorious Respondents' remand motions. In fact, however, it is the PLC/Ilford/IPC group[1] which has steadfastly sought to prevent the proper exercise of state court jurisdiction in this matter. The Ilford removal, which bought PLC the time necessary to sell the Ilford stock before a turnover could be effected, was *itself* improper. The propriety of IPC's removal at the instant stage of the turnover proceeding is, of course, the subject of this appeal.

[1] The Court will note that, despite the facts that neither IPC nor its property are at risk in the turnover proceeding and that IPC has additionally been fully indemnified by PLC's parent, Ciba-Geigy, for any possible loss incurred as a result of the turnover proceeding (Appendix "A", p. 3a), IPC vigorously assails not only the instant turnover proceeding, but also Respondents' prior attempts to collect their Judgment from Ciba-Geigy and Ilford (Petition, at pp. 2, 3).

IPC further incorrectly represents (Petition, p. 3), that Respondents' October 26, 1988 turnover proceeding seeking recovery of the Ilford shares was merely a "stratagem to defeat federal jurisdiction" culminating in the "voluntary [dismissal of] the action against Ilford Photo" on August 29, 1990, *id.* In fact however, Ilford's improper removal was itself *demonstrated* to be but a "stratagem" to defeat state jurisdiction – a stratagem which, while a legal failure, was a tactical success in the sense that it gave PLC time to sell the Ilford Photo stock before a turnover thereof could be effected. Appendix A, at p. 3a.

Yet again, IPC incorrectly represents that the Respondents have now brought a *"fraudulent conveyance action against IPC"*, when in fact the turnover proceeding to which IPC now finds itself a party is not brought *"against* IPC." *See, post,* at pp. 9-11. By misrepresenting the nature of the relief sought by Respondents, Petitioner has contrived to make it appear that "Respondents have sought to divest the federal courts of removal jurisdiction [over] a *new claim* . . . *against* a new party, IPC . . . ", when in fact the only relief sought in the turnover proceeding is against PLC and property (the Ilford shares) of which it retains equitable ownership by having fraudulently attempted to transfer same to IPC with full knowledge of the Respondents' rights thereto. *See,* Appendix A, p. 3a.

B. Proceedings Below

On August 29, 1990, Respondents amended their Application for Turnover Relief, naming IPC as a party-defendant and seeking to have the transfer to IPC

declared void. As in their Original Application, Respondents sought to have the Ilford stock turned over to them in satisfaction of their judgment against PLC. Appendix A, p. 4a. Significantly, they did *not* seek to hold IPC liable to satisfy their judgment against PLC.

Petitioner nevertheless again incorrectly represents (Petition, p. 3 "Proceedings Below") that Respondents "filed a fraudulent conveyance action *seeking relief against IPC,*" when in fact neither IPC nor its property are at risk, the only relief sought being against PLC and *its* property (the Ilford shares), and only then if same is *proved* to be the property of PLC. *See post,* at pp. 8, 9.

Yet again, in representing that it "timely removed this *action* on September 21, 1990" Petition at 3, 4, Petitioner mischaracterizes as uncontested "facts" both the proposition that its removal was "timely" (when that is the precise, and undetermined, issue before the Court), and that *what* it removed was a new and independent "action" rather than an ancillary post-judgment proceeding.

In remanding this matter to the federal district court, the Fifth Circuit held that 28 U.S.C. § 1446(b)'s one-year removal bar applied to prevent a removal of this case *unless* the Respondents have stated a new and independent civil action against the Petitioner in their Amended Application for Turnover Relief, which would render the one-year bar inapplicable.

That question, in turn, depends upon whether the Texas Turnover Statute *encompasses* the precise relief sought in the Amended Application (a determination of whether property in the hands of the Petitioner actually

belongs to PLC, and is therefore subject to execution) – not whether the Texas courts have "classified" or "characterized" the proceeding as ancillary or independent. The Fifth Circuit held that if the Texas Turnover Statute *does* encompass such relief, then the instant proceeding cannot be classified as a new and independent civil action under the established *federal* definition of that term, but is instead a mere continuation of the 1983 lawsuit against PLC.

It was within *this* context that the Fifth Circuit held that the district court must determine whether a Plaintiff may seek, as a part of his application for turnover relief, to prove that property in the hands of a third-party was fraudulently conveyed and therefore actually belongs to the Judgment-Debtor. If the Texas Turnover Statute is found to comprehend such a determination, then, the court held, the Respondents' Amended Application is but a mere continuation of the action filed in 1983, and not a new and independent "civil action" within the meaning of § 1441. *See*, Appendix A, at pp. 7a, 8a. The court did *not* hold that the terms "civil action" or "new and independent action" may be defined by reference to state characterizations of the Texas Turnover Statute, or that the State of Texas is competent to classify the relief embraced by its turnover statute as either "independent" or "ancillary"; rather, it held that the question of classification itself depends upon the nature of the relief afforded by the statute. Said the court: "If the district court determines that the Grassis can allege that International Paper is a fraudulent transferee *as part of their claim for turnover relief*, then the Amended Application *is an extension* of the 1983 suit and the district court must

remand this case to state court under the one-year rule of § 1446(b)." Appendix A, at p. 8a.

Finally, Petitioner is incorrect in stating that the Fifth Circuit's decision "contravened earlier rulings of the Fifth Circuit and [this court] . . . " As will be shown in more detail, *post*, the Fifth Circuit's holdings are completely consistent with all relevant prior decisions. Accordingly, the Fifth Circuit correctly denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

ARGUMENT

[A] QUESTION PRESENTED FOR REVIEW. (Petition, pp. i, 5)

Petitioner has misstated the question for review to be whether a court may "decide whether a proceeding is an independent and removable 'civil action' under 28 U.S.C. § 1441 by referring to state, rather than federal law", (Petition, at pp. i, 5), when in fact, the only question presented here is whether courts are to be prohibited from referring to state laws for the purpose of determining whether the remedies provided therein constitute independent "civil actions" within the accepted federal definition of that term.

[B] RESPONSE TO THE REASONS ASSERTED BY PETITIONER FOR THE GRANTING OF A WRIT. (Petition, pp. 6-16).

[1] The Fifth Circuit's Holding is Consistent With the Holdings of This Court.

In holding that a federal district court may look to state law to determine whether a particular remedy exists

for the purpose of classifying a proceeding as either independent or ancillary, the Fifth Circuit did *not* deviate from the principal that *federal* law controls the process of classification. Indeed, it is precisely because the scope of relief provided by a state statute is *determinative* of its characterization under established federal standards that federal courts can and do routinely look to the state laws to determine what they encompass.

The case of *Action Auto Stores, Inc. v. United Insurance Company*, No. 5:91-CV-32, available on Westlaw as 1992 WL 21203 (W.D. Mich. 1992), relied upon by Petitioner (Petition, at p. 10), is a case in point. In *Action Auto*, the court looked to the *actual* remedy provided, and found that "despite the *label* placed upon the action, the proceedings are *treated* in many ways as *separate civil actions*". Appendix E, at 4. Were the court to have been prohibited from referring to the laws of Michigan to determine the nature of the remedies *actually* embraced by the Rules in question, as Petitioner demands, it would have had no basis upon which to arrive at a *correct* characterization of the garnishment proceeding in question. Only by referring to the *actual* nature of the garnishment remedy provided could the court arrive at an *accurate* characterization of same under a uniform federal standard.

It is for this reason that in deciding the removability of post-judgment proceedings, the courts invariably turn to the nature of the relief afforded to determine whether a proceeding brought thereunder is a new and independent "civil action", or merely a continuation of the underlying lawsuit, the determining factor most often being whether or not the proceeding involves "litigating the existence of a *new liability*", *Butler v. Polk*, 592 F.2d 1293, 1295 (5th Cir.

1979).[2] It would stretch credulity to assert that a court could successfully determine whether such a proceeding was "independent" or "ancillary" *without* first determining the nature of the relief afforded by the statute or rule in question.

In the instant case, the Respondents have sought relief which is, by its very nature, ancillary rather than independent. Unlike those instances wherein judgment creditors seek to make garnishees liable for their judgments, the Respondents here have *not* sought to impose

---

[2] See, *Adrianenssens v. Allstate Ins. Co.*, 258 F.2d 888, 890: "[t]he issue between the parties was whether the *insurer was liable under its policy*"; *London v. Lancashire Indem. Co. v. Courtney*, 106 F.2d 277, 283 (10th Cir. 1939): "any process . . . which when served upon [the defendant insurance company] as garnishee would have the effect to *authorize an order or judgment in personam against him* . . . is to be regarded . . . as an independent proceeding. The Motion for Writ of Garnishment *under such condition* . . . is in effect an independent and original action . . . "; *Bridges v. Bentley*, 716 F.Supp. 1389, 1392 (D. Kansas 1989): "The garnishment action is a suit involving a new party *litigating the existence of a new liability* [because] [t]he garnishment petition is couched in terms of *individual liability* on the part of Farmer's Casualty Company Mutual"; *Stewart v. EGNEP (PTY) Ltd.*, 581 F.Supp. 788, 790 (C.D. Illinois 1983): "Even though [the garnishee] submitted itself to the state court's jurisdiction, it is *now* faced with a substantially *new* and *different* cause of action, . . . For the *first* time, [the garnishee] is faced with $56,000,000 *of personal liability*, instead *of an order to turn over one of its depositor's assets.*" In *Randolph v. Employer's Mutual Liability Ins. Co. of Wisconsin*, 260 F.2d 461 (8th Cir. 1958) relief upon by Petitioner, the court held that "the only issue [in a garnishment action against a defendant's insurance carrier] is the *liability of the garnishee on its insurance contract* . . . ".

any personal liability upon IPC or to place IPC's property at risk. (The only property sought herein are the shares of Ilford, and only then if they are found to be the property of PLC).

Significantly, the courts have been invariably careful to *distinguish* actions instituted for the purpose of imposing liabilities upon new parties from proceedings such as the instant one which are instituted for the sole purpose of identifying and seizing property *of the judgment debtor* which may be found in the *hands* of third parties. This distinction has been repeatedly recognized and emphasized by both federal *and* state courts in the context of fraudulent transfer, turnover and garnishment proceedings. *See e.g., American National Bank of Austin v. Mortgageamerica Corp.*, 714 F.2d 1266, 1272, 1273, 1275 (5th Cir. 1983), and *Bado Equipment v. Bethlehem Steel*, 814 S.W.2d 464, 474 (Tex.App. – Houston [14th Dist.] 1991, no writ) (construing the Fraudulent Transfer Act), *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 740 (Tex. 1991), *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 227 (Tex. 1991), *Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co.*, 703 S.W.2d 345, 349 (Tex.App. – San Antonio 1985, no writ), and *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 288 (Tex.App. – Dallas 1985, no writ) (construing the Turnover Statute), and *Stewart v. EGNED Ltd., supra*, wherein the court distinguished between situations in which garnishees are mere stakeholders and those in which they are sought to be made personally liable for the indebtedness of the judgment debtor.

In *American National Bank of Austin v. Montgageamerica, supra*, for example the Fifth Circuit correctly

identified the process of recovering property pursuant to the Fraudulent Transfer Act as follows:

> [T]he remedy afforded a successful claimant [in a fraudulent transfer action] relates entirely to the debtor's fraudulently transferred property and *entails no personal liability on the part of those responsible for the transfer, see, e.g., Cantwell v. Wilson,* 241 S.W.2d 366 (Tex.Civ.App. – Austin 1951, no writ) (construing predecessor statute). A suite under the Texas [Fraudulent Transfers] Act, in other words, pursues the *debtor's* property. . . .
>
> The basic principle of a fraudulent transfers act, . . . is that '[a]s to the creditors, *the property continues in the debtor,* and it or its proceeds are liable to the creditor's demands.' *Hallack v. Hawkins,* 409 F.2d 627, 630 (6th Cir. 1969) (construing the Uniform Fraudulent Conveyance Act). at pp. 1271, 1273.

Later in the same opinion, the Fifth Circuit again identified the process as:

> [e]ssentially [an attempt to recover] property which *properly belongs to the debtor* and which the debtor has fraudulently transferred in an effort to put it out of the reach of creditors . . . the transferee may have colorable title to the property, but the equitable interest at least as far as the creditors (but not the debtor) are concerned – is considered to *remain in the debtor* so that creditors may . . . execute judgment upon it *as though the debtor* had never transferred it. (Emphasis supplied), at p. 1275.

In *Bado Equipment v. Bethlehem Steel, supra,* the court put it more succinctly, to wit: *"[A] cause of action* [brought

pursuant to the Fraudulent Transfer Act] *is against the party making the transfer, not against the party accepting the transfer*", *Id.*, at 474.

The Texas Turnover Statute likewise exists only to better permit the assets of *judgment debtors* to be reached, it is *not* used as a vehicle to impose liability upon third parties, *viz:* "[T]exas courts *do not apply the turnover statute to [i.e.,* do not impose personal liability upon] *non-judgment debtors*", *Beaumont Bank, N.A. v. Buller, supra,* at 227.

Nevertheless, the Turnover Statute can and does serve as a vehicle to identify and recover the property of a *judgment debtor* which is in the *hands* of third parties. *Schultz, supra,* at 740, *Norsul Oil & Mining Ltd., supra,* at 349, *Childre, supra,* at 288, *First City National Bank of Beaumont v. Phelan,* 718 S.W.2d 402 (Tex.App. – Beaumont 1986, writ ref'd n.r.e.).

Despite this settled law, IPC argued in the courts below that the question of whether the Ilford stock belongs to PLC is *not* one which can be raised in a turnover proceeding. Pretermitting that question, the Fifth Circuit merely held that *if* the Turnover Statute properly comprehends a determination of that issue, then the relief sought by Respondents herein is clearly ancillary, and not independent. Appendix A, p. 8a. Such holding manifestly does not conflict with prior decisions of this Court.

For example, this Court's holding in *Grubbs v. General Electric Credit Corporation,* 405 U.S. 697, 705 (1972) that state laws may not pre-empt federal criteria for determining removal jurisdiction is in no manner contravened by

the Fifth Circuit's holding herein that state law may be referred to for the purpose of determining whether the federal criteria have been *met*.

Similarly, this Honorable Court's holdings in *Shamrock Oil and Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941), *Chicago R.I. and P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954), and *Road District v. St. Louis S.W. Ry. Co.*, 257 U.S. 547, 551 (1922), that state laws cannot pre-empt federal characterizations which are determinative of federal jurisdiction, are not contravened by the Fifth Circuit's holding herein that state laws *may* be looked to for the purpose of determining whether the federal characterizations are applicable in each of the disparate circumstances under which their application is sought.

The uniformity of a standard is not jeopardized by the process of identifying the variegated circumstances under which its application may be sought. The Fifth Circuit in the instant case did not hold that state characterizations may be relied upon to determine whether a proceeding is "ancillary" or "independent", but rather that the nature of the state remedies afforded the Respondents must be looked to in determining whether established *federal* criteria have been met. Such a holding manifestly does not contravene the prior holdings of this Court.

[2] The Fifth Circuit's Holding is Consistent With the Holdings of the Second, Fourth, Eighth, and Ninth Circuits.

Just as it did not contravene the holdings of this Honorable Court, the Fifth Circuit's holding in the instant

case does not conflict with the holdings of the various Circuit Courts of Appeals. The Fifth Circuit herein did not hold that the law of Texas could "supersede the privilege of removal granted by a federal statute", *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 862 (2d Cir. 1988), or that the construction of the removal statutes is *not* "purely a matter of federal law", *Able v. Upjohn Co., Inc.*, 829 F.2d 1330, 1333 n.2 (4th Cir. 1987), or that courts need not "look to federal criteria", *Randolph v. Employer's Mutual Liability Ins. Co. of Wisconsin, supra*, at 463, or that "the *classification* which [state] courts give [post-judgment] proceedings" is somehow binding upon federal Courts, *Randolph*, 265 F.2d at 464, or that federal law should not be looked to to determine whether the "elements of removal jurisdiction have been established under the statutes", *McCarthy Western Constructors, Inc. v. Phoenix Resort Corp.*, 951 F.2d 1137, 1140 (9th Cir. 1991).

Rather, the Fifth Circuit held that the district court must ascertain the extent of the relief afforded by the Texas Turnover Statute and, if it embraces the determination sought by Respondents, remand the turnover proceeding as one which is ancillary to the underlying (non-removable) claim.

[3] The Fifth Circuit's Holding Did Not Conflict With Prior Fifth Circuit Precedent.

The distinction between accepting a characterization and making an independent determination has, of course, been consistently recognized and applied by the Fifth Circuit. In *Butler v. Polk*, 592 F.2d 1293 (5th Cir. 1979), for example, the Fifth Circuit recognized that while "the

proper *characterization* [of a post-judgment garnishment proceeding] under §1441 is essentially a matter of federal law . . . ", the cases which construe garnishment actions "reflect the recognition that [such actions] are in effect suits involving a new party *litigating the existence of a new liability*", *Id.*, at 1296. The court thus acknowledged the necessity of referring to *federal* criteria *and* to the *nature* of the *state remedy* in arriving at a proper characterization thereof. It further recognized the distinction which exists between independent actions which seek to impose *new liabilities* and ancillary proceedings which do not. *Id.*, at 1296. In *Jones v. Roadway Exp., Inc.*, 931 F.2d 1086, 1092 (5th Cir. 1991), the Fifth Circuit again turned to state law (Title 130 of the Revised Civil Statutes of Texas, including art. 8307c) to determine whether it was the intent of the Texas Legislature that art. 8307c remain an integral part of the Texas Workers' Compensation scheme, even while applying the applicable federal criteria in making the appropriate classification. *Id.*, at 1092.

Yet again, in *Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986), the court merely applied the rule laid down by this Court in *Shamrock, supra*, that the removal statute is "unaffected by local law *definition or characterization* of the subject matter to which it is to be applied . . . "; it did *not* destroy the very process by which such characterizations are made by holding that a court may not refer to state law for the purpose of determining the nature of the remedy afforded thereby. *Id.*, at 480. Yet again, in neither *Paxton v. Weaver*, 553 F.2d 936 (5th Cir. 1977) nor *Central of Georgia Ry. Co. v. Riegel Textile Corp.*, 426 F.2d 935 (5th Cir. 1970) did the Fifth Circuit construe this Court's holding in cases such as *Grubbs, supra*, and *Shamrock, supra* in the

manner advocated by Petitioner. Indeed, in *Paxton*, the court once again *referred* to the remedies afforded by the law of Mississippi in arriving at its own characterization. *Paxton, supra,* at 939, fn.2. "We only need to decide whether, under a liberal review of *Mississippi law* or what it might be, arguable grounds exist for a recovery under appellants' theories."

There thus exists no "irreconcilable conflict" between the Fifth Circuit's prior holdings and its holding in the instant case. On the contrary, its holding herein is entirely consistent with all such prior decisions.

Petitioner's contention that "Congress could not and did not intend that the right of removal should depend upon *state law*", Petition, at p. 10, is thus simply not true in the sense intended by Petitioner. References to state laws and the remedies provided therein are in may cases absolutely essential to a proper application of the federal removal standards.[3]

Because the Fifth Circuit's holding in the instant case did not contravene, but was fully consistent with, all relevant prior decisions, the Fifth Circuit correctly denied Petitioner's Petition for Rehearing and Suggestion for

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[3] Petitioner's attempts to create conflicts between state court interpretations of the Texas Turnover Statute and that statute's proper "characterization" under appropriate federal criteria are, to paraphrase Petitioner "flawed both in their reasoning and in their result". Petition, at p. 10. The proposition that a party's removal "rights" would be *lost* by a "broad" construction of the removal statute to embrace the relief requested by Respondents is totally irrelevant to the issue of whether such a remedy, if it exists, provides for "independent" or "ancillary" relief under the appropriate federal standards.

Rehearing En Banc, and its Petition herein should also be, in all things, denied.

CONCLUSION

Wherefore, Respondents respectfully pray that the request of Petitioner that a Writ of Certiorari issue herein be in all things denied.

Respectfully submitted,

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No. 92-291

Supreme Court, U.S.
FILED
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IN THE

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INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

ALEXANDER GRASSI, SR., ET AL.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. By Holding That the Scope of the Texas Turnover Statute Controls Whether a Proceeding is Removable Under 28 U.S.C. § 1441, the Fifth Circuit Panel's Decision Conflicts With the Established Rule That Removal Statutes Are to be Construed Under Federal Law.

International Paper Company's ("IPC") Petition for a Writ of Certiorari was prompted by the Fifth Circuit panel's instruction to the district court to decide if an action was removable based on:

> " . . . whether, under Texas law, a plaintiff may seek turnover relief from a new defendant by alleging that the new defendant obtained the property in violation of the UFTA [the Uniform Fraudulent Transfer Act] and thus the original defendant (the judgment debtor) retains ownership or control of the property."

(App. 8a)[1] This is the only decision by a United States Court of Appeals in modern times to hold that the scope of a civil action and the remedies allowed under state law control whether a proceeding is an independent and removable "civil action" for § 1441 purposes.

Respondents argue that the holding of the Fifth Circuit panel is "completely consistent" with all relevant prior decisions, but go on to assert that "the scope of relief provided by a state statute is *determinative* of its characterization under established federal standards." (Opp. Br. 6-7 (Respondents' emphasis)) This assertion squarely contradicts the holdings of this Court in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705 (1972) and *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941), as well as decisions in the Second, Fourth, Fifth, Eighth and Ninth Circuits, which hold that removal statutes are to be uniformly interpreted under federal law. (Pet. 6-11) As demonstrated below, none of the case law cited by Respondents supports the argument that state law treatment of post-judgment

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[1] The Petition for a Writ of Certiorari is referred to as "Pet." Respondents' Brief in Opposition is referred to as "Opp. Br." All appendix references (App.) are to the appendix contained in Petitioner's Petition for a Writ of Certiorari.

proceedings controls the mandatory application of federal law to the determination of which suits may be removed from state to federal court.

Reduced to its essentials, Respondents' argument is: (1) that the removability of this case is controlled by whether *state* law permits the assertion of a fraudulent conveyance claim as part of the original civil action through the device of a "turnover" application; and (2) that such a result is consistent with cases which have uniformly held that *federal* criteria are determinative of removability. Respondents' position is thus based on a transparent logical contradiction. Under Respondents' analysis, the removability of a fraudulent conveyance action or a garnishment proceeding depends on whether state law permits such an action to be brought as "part" of the underlying action. Any such result would conflict directly with established federal law which requires that the removability of such post-judgment proceedings be uniformly determined under federal law applicable to 28 U.S.C. § 1441, irrespective of the vagaries of state law. To that end, the federal courts have developed federal criteria to determine whether an action is removable. *See infra* pp. 3-4. By making removability in this case turn on " . . . whether, *under Texas law*, a plaintiff may seek turnover relief from a new defendant by alleging the new defendants obtained the property" by means of a fraudulent conveyance, the panel below placed itself squarely in conflict with controlling federal precedent under which removability is determined under federal law, irrespective of the remedies allowed in the underlying action as a matter of state law.

A. The Fifth Circuit Panel's Decision Directly Conflicts With Fifth Circuit Law Holding That Post-Judgment Actions Involving New Claims Against a New Party are Removable as a Matter of Federal Law.

To IPC's knowledge, the exact question of whether a fraudulent conveyance action asserted in the context of a turnover proceeding is a new and separate action for the purpose of removal has never before been determined in the Fifth Circuit.

However, the Fifth Circuit has held that a conceptually identical post-judgment action, a garnishment proceeding, which seeks the enforcement of a debt against a new party, is removable under § 1441(a) and (b) as a separate civil action. *Butler v. Polk*, 592 F.2d 1293, 1295 (1979).[2] In reaching this conclusion in *Butler v. Polk*, the Fifth Circuit reasoned: "garnishment actions against third-parties are generally construed as independent suits, at least in relation to the primary action." *Id.* at 1295. In *Berry v. McLemore*, 795 F.2d 452 (5th Cir. 1982), the Fifth Circuit explained that "[t]he writ of garnishment, under the clear precedent of this Court, is an action separate and independent from the action giving rise to the judgment debt". *Id.* at 455.

In *Moore v. Sentry Ins. Co.*, 399 F. Supp. 929, 930 (S.D. Miss. 1975), which the Fifth Circuit cited with approval in *Butler*, 592 F.2d at 1295 n.4, the garnishee removed the action on the basis of diversity jurisdiction, even though the judgment creditor and debtor were residents of the same state. 399 F. Supp. at 930-31. The court permitted removal because the garnishment suit was "one in which an issue of fact might be joined and which is an adversary proceeding calling for judgment independent of the main cause." *Id.* at 931. The court also recognized that "[c]ases following this modern rule [that Federal law is determinative of removal issues] have universally held that garnishment proceedings are 'civil actions' which are removable where diversity and jurisdictional amount are present." *Id.* at 930.

Some of the factors that have influenced the Fifth Circuit's holdings are that such post-judgment actions involve a "new party

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[2] Numerous other courts have also recognized that garnishment actions are removable under § 1441. *See Adriaenssens v. Allstate Ins. Co.*, 258 F.2d 888 (10th Cir. 1958); *London and Lancashire Indem. Co. v. Courtney*, 106 F.2d 277 (10th Cir. 1939); *Bridges v. Bentley*, 716 F. Supp. 1389 (D. Kan. 1989); *Graef v. Graef*, 633 F. Supp. 450 (E.D. Pa. 1986); *see also Pullman Co. v. Jenkins*, 305 U.S. 534, 538 (1939) ("the fact that under the state practice it may be joined in the same suit with another controversy against other defendants, does not preclude removal"); *Swanson v. Liberty Nat'l Ins. Co.*, 353 F.2d 12, 13 (9th Cir. 1965) ("the labels that case had in the state court and the fact that the whole sequence had only one case number there are not determinative of the question of whether the garnishment issue is separable" from the underlying action).

litigating the existence of a new liability", *Butler*, 592 F.2d at 1296; may involve new issues of fact, *Moore*, 399 F. Supp. at 930; and are adversarial, calling for a judgment independent of the main cause. *Id.*; *see also Stewart v. EGNEP (Pty) Ltd.*, 581 F. Supp. 788, 790 (C.D. Ill. 1983).

All of those factors are present in this case and confirm that Respondents' fraudulent conveyance action against IPC is a separate "civil action". First, IPC was not a party to the underlying 1983 personal injury action; it is a new party litigating the existence of an alleged fraudulent transfer. Second, the Turnover Application is couched in terms of liability on IPC's part and, significantly, seeks relief only from IPC. (Pet. 3) While Respondents have contended that they seek no affirmative relief from IPC (Opp. Br. 4, 8-9), that contention is clearly contradicted by their own pleadings and the relief they seek. The purpose of this action is to seize an asset to which IPC has title in order to recover from IPC the judgment which Respondents have been unable to collect from PLC. (Pet. 3) Third, Respondents' action is adversarial and will involve issues of fact and law entirely distinct from the underlying products liability suit. Those issues include questions concerning the sufficiency of the consideration paid by IPC and the circumstances of the sale of Ilford Photo, which have no bearing on the safety of the insulating material which was at issue in the 1983 action. (Pet. 2)

Thus, regardless of whether Texas state law might allow a fraudulent conveyance action to be asserted as a "turnover" application in the underlying litigation, such an action, which is intended to establish an obligation against a new party who is a stranger to the original action, and which will involve an adversarial, evidentiary proceeding, is, but for the conflict created by the Fifth Circuit panel's holding, removable as a matter of federal law.

Respondents attempt to distinguish garnishment proceedings with the argument that a garnishment proceeding imposes a new "liability" whereas a fraudulent conveyance proceeding is said not to do so. As a threshold matter, that is a meaningless distinction since a garnishment proceeding, which seeks only to attach a specific preexisting debt of the garnishee, is more analogous to

a fraudulent conveyance proceeding, which seeks only to attach a specific asset, than to an open-ended "liability" proceeding. More important, for purposes of this petition, that argument is simply irrelevant to the validity of the decision of the panel below, which does not apply federal criteria to determine the removability of garnishment and/or fraudulent conveyance proceedings, but rather makes removability turn on whether the State of Texas allows fraudulent conveyance proceedings to be brought as "part" of the underlying proceeding.

B. The Authority Cited by Respondents Does Not Reconcile the Conflict Created by the Fifth Circuit Panel's Holding.

None of the case law cited in Respondents' Brief in Opposition supports the notion that removal statues can be construed by reference to any thing other-than federal law. Respondents first cite a garnishment case, *Action Auto Stores, Inc. v. United Insurance Company*, No. 5:91-CV-32, available on Westlaw as 1992 WL 21203 (W.D. Mich. 1992). (Opp. Br. 7) Yet, the *Action Auto* court explicitly held:

> "The Supreme Court has determined that a state's procedure cannot control the privilege of removal granted by federal statute. *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954). Allowing the state's labeling of its garnishment procedure to control this Court's determination about whether the action is removable might well be inconsistent with the *Chicago R.I. & P.R.* decision. *Drs. Macht, Podore & Associates*, 392 F. Supp. at 67; 1A James Moore, Moore's Federal Practice P 0.167 (2d ed. 1991); *see also Stewart v. EGNEP (Pty), Ltd.*, 581 F. Supp. 788, 789-90 (C.D. Ill. 1983). The Court thus holds that it is not bound by state law but must make its own determination about whether the proceedings are ancillary."

Id. at *2. (App. 4e) The *Action Auto* holding concentrated on the substance of the action to determine whether it was ancillary and disregarded the state law label placed on the action, basing its decision on the fact that the garnishments involved new parties

with different interests than those present in the underlying actions. *Id.*

Similarly, the second garnishment case cited by Respondents, *Butler v. Polk*, 592 F.2d 1293 (5th Cir. 1979), reaffirms that where the parties and liability issues in a post-judgment enforcement action are distinct from those involved in the underlying litigation, the new proceeding should be treated as a separate "civil action" regardless of its characterization under state law. *Id.* at 1296. Respondents cannot assert that the turnover action does not impose any obligation on IPC or place IPC's property at risk (Opp. Br. 8-9), since the only relief sought by Respondents in this litigation is an order directed exclusively at IPC, a new party to the proceeding, to turn over its shares of Ilford Photo or a cash equivalent. (Pet. 3) The fraudulent conveyance action against IPC necessarily challenges the conduct and good faith of IPC in purchasing Ilford Photo, an accusation which requires a judgment in an adversary proceeding independent of the underlying product liability action. Thus, IPC is entitled, purely on the basis of federal law, to remove the action to federal court.

Respondents' Brief in Opposition places a great deal of emphasis on the distinctions Fifth Circuit and Texas state courts have drawn between actions that impose liabilities on new parties and those which are instituted to identify and seize property of a judgment debtor (Opp. Br. 9-11), and attempts to include their fraudulent conveyance action in the latter category. As demonstrated above, Respondents' fraudulent conveyance action does indeed involve the imposition of a new obligation against IPC. *Stewart v. EGNEP*, 581 F. Supp. at 789-90, the only case cited by Respondents in this context that deals with a question of removal, teaches only that a garnishment action may be removed even when state law regards the proceeding as ancillary to the main suit. *Id.* More importantly, none of the other cases cited by Respondents involve the application of federal removal statutes, the interpretation of which, as demonstrated throughout this brief and the original Petition, is controlled by federal law. If anything, these cases illustrate how the application of state law to federal removal statutes can lead to differing results from state to state,

undermining the rule laid down by this Court in *Grubbs v. General Electric Credit Corp.*, 405 U.S. at 705, and *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. at 104, that removal statutes must be construed to have "uniform federal application". *Grubbs*, 405 U.S. at 705. This would be made impossible if courts were forced to adopt disparate characterizations of post-judgment proceedings under varying state laws. (Pet. 10)

The inevitable inconsistency which would result from allowing the Fifth Circuit panel's holding to remain in force is demonstrated by the holding of the Western District of Michigan in *Action Auto*. The *Action Auto* court recognized that under Michigan law, garnishments are ancillary to and part of the underlying civil litigation. *Action Auto*, 1992 WL 21203 at *2. (App. 3-4e) Nevertheless, the Court recognized that "a state's procedure cannot control the privilege of removal granted by federal statute", and found a garnishment action to be a separate and independent action for the purpose of removability. *Id.* Had the *Action Auto* court been bound by the holding of the Fifth Circuit panel, the court would have had no choice but to acknowledge that *under Michigan law*, a garnishment action is an ancillary proceeding and the defendant in question would have been denied his right of removal.

The impossibility of uniformly applying the removal statute under the Fifth Circuit panel's holding is further illustrated by the different categorizations imposed by states on identical proceedings. For example, while the state of Michigan classifies garnishment actions as ancillary, under Mississippi state law, garnishment proceedings are treated as separate causes of action. *See Moore v. Sentry Ins. Co.*, 399 F. Supp. 929, 931 (S.D. Miss. 1975). Thus, if courts were bound by the holding of the Fifth Circuit panel, the right of removal in identical proceedings would vary from state to state.

C. Respondents' Attempt to Reconcile the Holding of the Fifth Circuit Panel With Previous Holdings Mischaracterizes the Fifth Circuit Panel's Holding.

Respondents argue against the granting of certiorari by maintaining that the Fifth Circuit panel's holding "did not contravene, but was fully consistent with, all relevant prior decisions." (Opp. Br. 15) The thrust of Respondents' Brief in Opposition (Opp. Br. 11-15) is that the Fifth Circuit Panel only held that a court is not prohibited from "looking" at state statutes before applying federal law to determine whether an action may be removed. Respondents argue that the panel's holding that IPC's right to remove Respondents' fraudulent conveyance action to federal court rested on:

> " . . . whether, *under Texas law*, a plaintiff may seek turnover relief from a new defendant by alleging that the new defendant obtained the property in violation of the UFTA [the Uniform Fraudulent Transfer Act] and thus the original defendant (the judgment debtor) retains ownership or control over the property"

(App. 8a) (emphasis added) only means that:

> " . . . state laws *may* be looked to for the purpose of determining whether the federal characterizations are applicable in each of the disparate circumstances under which their application is sought"

(Opp. Br. 12 (Respondents' emphasis)) and that:

> "[t]he Fifth Circuit in the instant case did not hold that state characterizations may be relied upon to determine whether a proceeding is 'ancillary' or 'independent', but rather that the nature of the state remedies afforded the Respondents must be looked to in determining whether established *federal* criteria have been met."

(Opp. Br. 12 (Respondents' emphasis)) Respondents further distort the panel's holding by arguing that the only question presented is whether courts are to be prohibited from examining state law before applying federal law to removal statutes.

(Opp. Br. 6) Had this been the holding of the Fifth Circuit, IPC would not have filed this Petition for a Writ of Certiorari.

IPC has never construed the holdings of this Court nor of any circuit court to mean that a federal court is forbidden to examine the characteristics of a state remedy in determining whether federal criteria have been met. Federal courts must, of course, examine the nature of the underlying action and the post-judgment remedy in deciding whether the post-judgment proceeding is a removable "civil action" under 28 U.S.C. § 1441. However, this Court, along with the Second, Fourth, Fifth, Eighth and Ninth Circuits, has held that federal law, and federal law alone, governs the determination of whether a proceeding is an independent and removable civil action under 28 U.S.C. § 1441 (Pet. 6-11). In other words, *even if Texas state law explicitly stated that a turnover action could never be treated as a separate proceeding*, a federal court situated in Texas would still be bound to apply federal law, and federal law alone, to determine whether the action in question was an independent and removable "civil action".

Respondents also offer an alternate, and contradictory, interpretation of the Fifth Circuit panel's holding. Although verbally acknowledging that federal standards apply to determinations of whether an action is independent and removable, Respondents contradict themselves by contending that:

> " . . . the Fifth Circuit held that the district court must ascertain the extent of the relief afforded by the Texas Turnover Statute and, if it embraces the determination sought by Respondents, remand the turnover proceeding as one which is ancillary to the underlying (non-removable) claim."

(Opp. Br. 13) This statement can be read only to mean that state and not federal law determines the question of removability, which is precisely the basis for IPC's Petition for a Writ of Certiorari.

Having mischaracterized the holding of the Fifth Circuit panel, Respondents cite several Fifth Circuit cases to support the proposition, never disputed by IPC, that a court may examine

state procedural law before applying federal law to removal questions. (Opp. Br. 13-15) All of these cases affirm that removal statutes are to be interpreted under federal, not state, law and in doing so conflict with the holding of the Fifth Circuit panel.

Finally, when confronted with the contradictions between the Fifth Circuit panel's holding and the rulings of this Court and the Second, Fourth, Eighth and Ninth Circuits, Respondents respond by reciting the case law presented by Petitioner and repeatedly asserting that their interpretation of the Fifth Circuit panel's holding does not conflict with the principle that removal statutes are to be uniformly interpreted under federal law. (Opp. Br. 12-13) Not surprisingly, Respondents make no attempt to reconcile the actual language of the panel's holding with their characterizations of that holding. Indeed, as shown above, they are forced to admit that the panel's decision makes state law determinative of removability. Respondents' disingenuous and conflicting interpretations of the Fifth Circuit panel's clear and straightforward holding must not be allowed to distract attention from the serious conflict between the Fifth Circuit panel's holding and previous rulings of this Court and the Second, Fourth, Fifth, Eighth and Ninth Circuits.

CONCLUSION

For the foregoing reasons and the reasons given in Petitioner's opening brief, this Court should issue a Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

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September 30, 1992